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No. 82-91

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PADUNGSRI PHINPATHYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether respondent's three-month absence from the United States may be considered meaningfully interruptive of her "continuous physical presence" in this country, for the purpose of determining eligibility for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1), even though the absence may not have reduced the severity of the hardships associated with her deportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 673 F.2d 1013. The decision of the Board of Immigration Appeals (Pet. App. 14a-21a) is not reported. The decision of the immigration judge (Pet. App. 22a-31a) is also not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1981. A petition for rehearing was denied on April 5, 1982 (Pet. App. 32a). Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 16, 1982. The petition was filed on that date and was granted on November 1, 1982 (J.A. 44). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. 1254(a)(1) provides:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> > (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

STATEMENT

1. Respondent is a native and citizen of Thailand who first entered the United States as a nonimmigrant student in October 1969. Respondent's husband, also a native and citizen of Thailand, entered this country in August 1968. Both respondent and her husband were authorized to remain until July 25, 1971, but they remained beyond that date without securing the permission of the immigration authorities (Pet. App. 1a).

a. In January 1977, the Immigration and Naturalization Service served an order to show cause on respondent and her husband, charging that they were deportable under Section 241(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(2), as nonimmigrants who had remained in this country beyond the

time authorized in their visas (J.A. 29-30). At the deportation hearing, both respondent and her husband conceded deportability and applied for suspension of deportation pursuant to Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1) (Pet. App. 2a). That section authorizes the Attorney General, in his discretion, to suspend deportation of a deportable alien. In order to be eligible for this discretionary relief, an alien must show that (1) he has been physically present in the United States for a continuous period of at least seven years immediately preceding the application for suspension of deportation; (2) he has been a person of good moral character during that seven-year period; and (3) deportation would result in extreme hardship to the alien or to his spouse, parent or child who is a United States citizen or lawful permanent resident.

In an affidavit filed in support of her suspension application, respondent asserted that she had "continuously lived in the United States since October 12, 1969" (J.A. 36). An investigation of the facts underlying respondent's application revealed, however, that she had last been admitted to the United States as the wife of a student on April 18, 1974 (J.A. 37, 38, 42). On the basis of this information, the INS amended its order to show cause with regard to respondent to reflect that respondent entered this country in April 1974 as the nonimmigrant spouse of a student, that she was authorized to remain until January 30, 1975, and that she had remained unlawfully beyond that date (J.A. 43). Counsel for respondent, while still conceding deportability, thereupon requested an opportunity "to show that this was a brief and casual and innocent departure from the United States and that [respondent] had been in the United States continuously since October 11, 1969 and

was gone from the United States for three months" (J.A. 13-14).[1]

At the ensuing hearing, respondent testified that in January 1974, she traveled with her two children to Thailand to visit her mother. She and her children returned to the United States three months later, in April 1974 (J.A. 17-18). About one month prior to her departure, respondent obtained a new Thai passport (J.A. 21-22); however, when she departed for Thailand, respondent did not have a nonimmigrant visa allowing her to reenter this country. Accordingly, after her arrival in Thailand, respondent went to the United States Consul and obtained a nonimmigrant visa as the wife of a foreign student in the United States. Although respondent was aware that her husband's student visa had expired more than two years earlier, in 1971, she failed to inform the consular officer of that fact (J.A. 23-24).

b. On the basis of this evidence, the immigration judge concluded that respondent's absence from the United States was neither brief, innocent, nor casual (Pet. App. 28a):

> The absence would have been longer than three months if she had not obtained the spouse of a student visa as fast as she did obtain it. It was not casual because she had to obtain a new Thai[] passport, as well as a nonimmigrant visa from the American Consul, to return to the United States. It was not innocent because she failed to inform the American Consul that she was the wife of a student who had been out of status for three years (and

[1] When respondent's counsel was first apprised of the results of the investigation showing that respondent had entered the United States in 1974, he stated that respondent was withdrawing her suspension application (J.A. 8). Shortly thereafter, counsel retracted that statement, explaining that respondent took the position that her absence was brief and that she had not made a "meaningful entry" in 1974 (J.A. 10).

therefore not entitled to the nonimmigrant visa she received).

Accordingly, the judge concluded that respondent's departure was meaningfully interruptive of her continuous physical presence in the United States and that she was ineligible for suspension of deportation on the ground that she had failed to meet the seven year "continuous physical presence" requirement of Section 244(a)(1) of the Immigration Act (Pet. App. 28a-29a).[2]

c. The Board of Immigration Appeals affirmed the immigration judge's decision on the "continuous physical presence" issue (Pet. App. 14a-21a).[3] In rejecting respondent's argument that her trip was not meaningfully interruptive of her "continuous physical presence" because respondent had intended, upon departing, to return to this country, the Board observed that when respondent traveled to Thailand in January 1974, "she had already remained beyond the time authorized * * * [and] was only able to obtain a visa to return by misrep-

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[2] The immigration judge rejected the contention of the INS that respondent was barred from establishing her good moral character on the ground that she had given false testimony for the purpose of obtaining a benefit under the Immigration and Nationality Act. See 8 U.S.C. 1101(f)(6) (Pet. App. 26a-27a). In addition, the judge found that respondent's epileptic daughter, who is a United States citizen, would suffer extreme hardship if respondent and her husband were deported (*id.* at 24a-26a). Finding that respondent's husband had satisfied the other eligibility requirements of Section 244(a)(1) of the Act (Pet. App. 26a, 27a), the judge granted suspension of deportation as to him (*id.* at 29a-31a).

[3] The Board reversed the immigration judge's decision with regard to the good moral character issue, finding that respondent gave false testimony at her deportation hearing (Pet. App. 18a-19a). The Board also reversed the immigration judge's conclusion that respondent's husband was eligible for suspension of deportation, ruling that he had failed to establish extreme hardship either to himself or to his epileptic daughter (*id.* at 19a-21a).

resenting her status as the spouse of a student, knowing full-well that she had no right to claim that status" (*id.* at 17a). Because respondent's departure substantially increased the likelihood that her illegal status would be discovered and that she would either be excluded or deported once her true status was ascertained, the BIA concluded that respondent's departure was a significant interruption of her physical presence in the United States, regardless of her intention to return to this country (*id.* at 17a-18a).

2. The court of appeals reversed (Pet. App. 1a-13a). Relying on its decision in *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979), the court concluded that the Board of Immigration Appeals had applied an erroneous legal standard in reaching its determination that respondent failed to meet the "continuous physical presence" requirement of Section 244(a)(1) of the Act (Pet. App. 8a).

In *Kamheangpatiyooth*, the court reaffirmed its earlier ruling in *Wadman* v. *INS*, 329 F.2d 812 (9th Cir. 1964), that the principles established by this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), to decide whether a departure by a lawful permanent resident alien was "intended" within the meaning of 8 U.S.C. 1101(a)(13), for purposes of determining whether the alien made an "entry" on his return to the United States, "should also guide the determination * * * whether an intervening absence interrupts the continuity of physical presence for purposes of section 244(a)(1)." 597 F.2d at 1256. Although this Court in *Fleuti* had pointed to several factors, including the duration of the alien's absence, the purpose of the visit and whether travel documents were obtained, as being relevant in determining whether a departure was meaningfully interruptive of an alien's lawful permanent residence (374 U.S. at 462), the court in *Kamheangpatiyooth* concluded that "these factors are only evidentiary on the issue under section

244(a)(1) of whether an absence reduced the significance of the whole seven-year period as reflective of the hardship and unexpectedness of exposure to expulsion." 597 F.2d at 1257 (footnote omitted). In the court of appeals' view (*ibid.*):

> An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

In the instant case, the court of appeals first noted that although respondent traveled to Thailand for three months, "she intended, at all times, to return to the United States" (Pet. App. 7a; footnote omitted).[4] The court then held that the Board of Immigration Appeals erred in concluding that respondent's departure was meaningfully interruptive merely because she thereby increased the risk of deportation (*id.* at 7a-8a). Instead, the court concluded that under the *Kamheangpatiyooth* test, a departure that increases an alien's risk of deportation cannot be meaningfully interruptive unless it also reduces the severity of the hardships that would result from deportation; moreover, according to the court, even if both factors are present, it does not necessarily follow that the departure must be regarded as having meaningfully inter-

[4] In describing respondent's trip, the court of appeals stated (Pet. App. 1a-2a, 6a) that the trip was for the purpose of visiting her sick mother. However, there is no evidence in the record of the administrative proceeding that respondent's mother was ill at the time of respondent's trip, much less that the illness occasioned respondent's visit to Thailand.

rupted the alien's "continuous physical presence" in the United States (Pet. App. 8a).[5]

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Immigration and Nationality Act, Congress provided that the Attorney General may suspend deportation and grant lawful resident status to an otherwise deportable alien who meets the "extreme hardship," "good moral character" and "continuous physical presence" requirements of Section 244(a)(1) of the Act. The question in this case concerns the proper standard for determining whether a deportable alien "has been physically present in the United States for a continuous

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[5] The court of appeals also overturned the BIA's determination that respondent was not of good moral character, holding that respondent's false statement on her application for suspension of deportation did not constitute false "testimony" within the meaning of 8 U.S.C. 1101(f)(6) and 1254(a)(1) (Pet. App. 9a-11a). Accordingly, the court remanded respondent's case to the BIA for reconsideration of the "continuous physical presence" and "good moral character" issues (*id.* at 12a).

In addition, the court reversed the BIA's finding that respondent's husband failed to prove that extreme hardship would result from deportation. The court held that the BIA abused its discretion in failing explicitly to consider the adverse effects of "the mere removal, and uprooting of [respondent's] epileptic child" from the United States (Pet. App. 4a-5a). The court remanded for reconsideration of "extreme hardship."

We believe that both of these rulings are questionable. The court's discussion of extreme hardship, in particular, demonstrates the Ninth Circuit's continued inability or unwillingness to follow this Court's directive in *INS* v. *Wang*, 450 U.S. 139 (1981), that the Attorney General's "construction and application of [the extreme hardship] standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *Id.* at 144. See, *e.g.*, *Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981); *Mejia-Carrillo* v. *INS*, 656 F.2d 520 (9th Cir. 1981); *Perez* v. *INS*, 643 F.2d 640 (9th Cir. 1981), petition for cert. dismissed pursuant to Sup. Ct. Rule 53, No. 82-243 (Nov. 2, 1982).

period of not less than seven years immediately preceding the date of [his] application [for suspension of deportation]." 8 U.S.C. 1254(a)(1).

It is fairly obvious that a literal interpretation of the "continuous physical presence" language in the statute would yield a simple and easily applied standard. Under this interpretation, an alien would be regarded as breaking the "continuity" of his "physical presence" within the meaning of Section 244(a)(1) any time he stepped outside our borders, regardless of the purpose or duration of his absence. For nearly 20 years, however—ever since the Ninth Circuit, in *Wadman* v. *INS*, 329 F.2d 812 (1964), held that the principles of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), are applicable in determining whether an alien's absence from this country has meaningfully interrupted the continuity of his physical presence in the United States—both the courts of appeals and the Board of Immigration Appeals have eschewed such a literal approach. Although the soundness of *Wadman* and, indeed, of *Fleuti*, may be subject to question, we do not challenge the validity of either decision here.

But even assuming, for present purposes, that the seven year "continuous physical presence" requirement of Section 244(a)(1) is not subject to a literal construction, the error of the court of appeals in this case is manifest. The court below held that the "continuous physical presence" requirement is satisfied in the case of an alien whose illegal overstay in this country has been interrupted by a three month trip abroad and who has knowingly misrepresented her status so as to secure reentry into the United States. Simply put, it is our submission that Congress could not conceivably have intended this result.

The court of appeals achieved this result by application of a test that finds no support in the language, structure or history of the Act, all of which indicate

that Congress intended the "continuous physical presence" requirement to be given a narrow interpretation. While, as already noted, the lower courts and the BIA have recognized an exception to the "continuous physical presence" requirement in the case of an alien whose absence is not "meaningfully interruptive" of his physical presence in the United States under the test established in *Rosenberg* v. *Fleuti*, *supra*, the decision below effectively erodes that test by concluding that a departure cannot be meaningfully interruptive if it does not reduce the hardships that would flow from the alien's deportation. This approach unjustifiably commingles two separate statutory elements, "extreme hardship" and "continuous physical presence." It is difficult to conceive of a class of cases in which deportable aliens would be able to show "extreme hardship" but not "continuous physical presence" under the court of appeals' interpretation.

Moreover, the court below concluded that the factors mentioned in *Fleuti* can be disregarded as merely "evidentiary"; in the court's view, the proper approach in determining whether an alien's absence was meaningfully interruptive "is to view the circumstances in their totality, and analyze those circumstances in light of the Congressional purpose underlying the continuity requirement" (Pet. App. 6a). Under this amorphous approach, the BIA is essentially left without any guidance and reviewing courts are left free to overturn administrative findings of no "continuous physical presence" in any given case on the basis of whatever "circumstances" the court cares to invoke.

Because the decision below seriously undermines this Court's *Fleuti* test, the decision will have substantial repercussions beyond the suspension of deportation context. If a lengthy departure such as respondent's is not meaningfully interruptive of an alien's "continuous physical presence" for purposes of determining eligibil-

ity for suspension of deportation, then a similar departure presumably would not be regarded as a meaningful interruption of an alien's lawful residence for purposes of determining, under 8 U.S.C. 1101(a)(13), whether a lawful permanent resident alien attempted or made an "entry" that would subject him to exclusion or deportation under the immigration laws. Thus, unless overturned, the court of appeals' decision will frustrate the government's efforts to deport aliens, such as respondent, who have repeatedly flouted the Nation's immigration laws.

ARGUMENT

THE COURT OF APPEALS ERRED IN REQUIRING THE BOARD OF IMMIGRATION APPEALS TO FIND THAT RESPONDENT'S THREE-MONTH ABSENCE FROM THE UNITED STATES WAS NOT MEANINGFULLY INTERRUPTIVE OF HER "CONTINUOUS PHYSICAL PRESENCE" IN THIS COUNTRY, FOR THE PURPOSE OF DETERMINING ELIGIBILITY FOR SUSPENSION OF DEPORTATION PURSUANT TO 8 U.S.C. 1254(a)(1), BECAUSE THE HARDSHIPS ASSOCIATED WITH HER DEPORTATION WOULD BE AS SEVERE IF THE ABSENCE HAD NOT OCCURRED

A. Respondent Failed To Show That Her Three-Month Trip Abroad Was Not Meaningfully Interruptive Under The "Innocent, Casual And Brief" Test Adopted By This Court In *Rosenberg* v. *Fleuti*

1. Under Section 244(a)(1) of the Immigration and Nationality Act, a deportable alien is ineligible for the extraordinary remedy of suspension of deportation unless he shows, inter alia, that he "has been *physically present* in the United States for a *continuous period of not less than seven years* immediately preceding the date of [his] application [for suspension of deportation]." 8 U.S.C. 1254(a)(1) (emphasis added). Until the Ninth Circuit's decision in 1964 in *Wadman* v. *INS*, 329 F.2d 812, the lower courts and the Board of Immigration Appeals generally applied a strict, literal interpretation of the "continuous physical presence" lan-

guage in Section 244(a)(1) and held ineligible for suspension of deportation any alien who was absent from the United States during the seven year period, without regard to the circumstances surrounding the absence. See, *e.g.*, *Arellano-Flores* v. *Hoy*, 262 F.2d 667, 668 (9th Cir. 1958); *United States ex rel. Bruno* v. *Sweet*, 133 F. Supp. 3, 6-7 (W.D. Mo. 1955), aff'd, 235 F.2d 801 (8th Cir. 1956); *In re Jacobson*, 10 I. & N. Dec. 782 (B.I.A. 1964); *In re Wong*, 10 I. & N. Dec. 513 (B.I.A. 1964). But see *McLeod* v. *Peterson*, 283 F.2d 180, 185-187 (3d Cir. 1960). In *Wadman*, however, the court held that the standards of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), should be applied to determine whether an alien's trip outside the United States was a sufficiently significant event as to break the continuity of the alien's physical presence in the United States.

In *Fleuti*, the Court faced the question whether a lawful permanent resident alien's return from an afternoon trip across the border to Mexico was an "entry" within the meaning of Section 101(a)(13) of the Act, 8 U.S.C. 1101(a)(13). That statute defines an "entry" as

> any coming of an alien into the United States * * * except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him * * *.

A sharply divided Court construed the term "intended" in the exception to the definition of "entry" for unintended departures by lawful resident aliens "as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." 374 U.S. at 462. The Court refused to hold that a lawful resident alien like Fleuti was subject "to exclusion for a condition for which he could

not have been deported had he remained in the country" merely because he "steps across a border and, in effect, steps right back * * *." *Id.* at 460. Such a holding, the Court concluded, would in effect place the alien "at the mercy of the 'sport of chance'" and subject him to "'meaningless and irrational hazards.'" *Ibid.*, quoting *DiPasquale* v. *Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947) (L. Hand, J.). In light of Congress' unquestioned ameliorative intent in creating an exception to the strict "entry" doctrine,[6] the Court concluded that

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[6] Section 101(a)(13) was enacted in 1952 in response to the harsh results visited upon resident aliens by earlier restrictive interpretations of the term "entry." The Senate and House Reports explained the statute in identical language:

> Normally an entry occurs when the alien crosses the border of the United States and makes a physical entry, and the question of whether an entry has been made is susceptible of a precise determination. However, for the purposes of determining the effect of a subsequent entry upon the status of an alien who has previously entered the United States and resided therein, the preciseness of the term "entry" has not been found to be as apparent. Earlier judicial constructions of the term in the immigration laws, as set forth in *Volpe* v. *Smith* (289 U.S. 422 (1933)), generally held that the term "entry" included any coming of an alien from a foreign country to the United States whether such coming be the first or a subsequent one. More recently, the courts have departed from the rigidity of that rule and have recognized that an alien does not make an entry upon his return to the United States from a foreign country where he had no intent to leave the United States (*Di Pasquale* v. *Karnuth*, 158 F.2d 878 (C.C.A. 2d 1947)), or did not leave the country voluntarily (*Delgadillo* v. *Carmichael*, 332 U.S. 388 (1947)). The bill defines the term "entry" as precisely as practicable, giving due recognition to the judicial precedents. Thus any coming of an alien from a foreign port or place or an outlying possession into the United States is to be considered an entry, whether voluntary or otherwise, unless the Attorney General is satisfied the departure of the alien, other than a deportee, from this country was unintentional or was not voluntary.

"an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." 374 U.S. at 462. This approach, according to the Court, "protects the resident alien from unsuspected risks and unintended consequences of such a wholly innocent action." *Ibid.*

The Court in *Fleuti* listed several factors that it considered relevant in determining whether a lawful permanent resident alien's departure was intended to be "meaningfully interruptive" of his permanent residence (374 U.S. at 462):

> One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country.

S. Rep. No. 1137, 82d Cong., 2d Sess. 4 (1952); H.R. Rep. No. 1365, 82d Cong. 2d Sess. 32 (1952).

In *DiPasquale*, the court had refused to hold that a resident alien made an "entry" after an overnight train on which the alien was a passenger passed through Canada on its way from Buffalo to Detroit. Similarly, in *Delgadillo* v. *Carmichael*, 332 U.S. 388 (1947), this Court had refused to treat as an "entry" the return of an alien taken to Cuba to recuperate after the merchant vessel on which he sailed was torpedoed during World War II. See *Landon* v. *Plasencia*, No. 81-129 (Nov. 15, 1982), slip op.9 n.6.

The Court pointed out that "the operation of these and other possibly relevant factors remain to be developed 'by the gradual process of judicial inclusion and exclusion' * * *." *Ibid.*, quoting *Davidson* v. *New Orleans*, 96 U.S. 97, 104 (1878). Because the record showed only that Fleuti had gone to Mexico for a visit of "'about a couple of hours'" (374 U.S. at 461), the Court remanded the case for a determination of whether Fleuti's departure was "not intended" within the meaning of Section 101(a)(13).[7]

The Ninth Circuit in *Wadman* concluded that "the term 'continuous' [in Section 244(a)(1)] is no more subject to a hard and fast construction than is the term 'intended' [in Section 101(a)(13).] The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in Fleuti." 329 F.2d at 816. Accordingly, the court in *Wadman* rejected the argument that the term "continuous" in Section 244(a)(1) must be construed literally. Because Wadman had remained in the United States for more than seven years prior to his application for suspension of deportation, with the exception of a five day vacation trip to Mexico, the court remanded the case to the INS for further proceedings on the "continuous physical presence" issue.

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[7] The four dissenting Justices in *Fleuti* concluded that the plain language and legislative history of Section 101(a)(13) compelled the view that Fleuti, whose departure from the United States clearly had been "intended," was subject to the consequences of an entry on his return to this country. 374 U.S. at 464-467. The dissenters noted that the definition of "entry" adopted by the Court had been suggested by many organizations prior to the enactment of Section 101(a)(13) but that Congress had explicitly rejected such an approach. See C. Gordon, *Recent Developments in Judicial Review of Immigration Cases*, 15 San Diego L. Rev. 9, 18 (1977); Comment, *Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform*, 13 San Diego L. Rev. 192, 197-200 (1975).

Following the decision in *Wadman*, the courts of appeals and the BIA began to apply the *Fleuti* standards in determining whether an alien's trip abroad broke the continuity of his physical presence in the United States for purposes of Section 244(a)(1). See, *e.g.*, *Toon-Ming Wong* v. *INS*, 363 F.2d 234, 235-236 (9th Cir. 1966); *Barragan-Sanchez* v. *Rosenberg*, 471 F.2d 758, 760-761 (9th Cir. 1972); *Heitland* v. *INS*, 551 F.2d 495, 500-504 (2d Cir.), cert. denied, 434 U.S. 819 (1977); *Mamanee* v. *INS*, 566 F.2d 1103, 1105 (9th Cir. 1977); *In re Wong*, 12 I. & N. Dec. 271 (B.I.A. 1967).

2. We are not all all certain that application of the *Fleuti* standards in the suspension of deportation context is consistent with Congress' intent that the "continuous physical presence" requirement in Section 244(a)(1) be construed strictly. See pages 20-25, *infra*. Nevertheless, even if the standards established in *Fleuti* are applicable in this context, we submit that under those standards respondent failed to meet her burden of showing that her trip abroad was not meaningfully interruptive of her "continuous physical presence" in the United States. Accordingly, respondent is ineligible for suspension of deportation.

Respondent's trip abroad was not "brief"; unlike Fleuti, whose visit to Mexico consumed "'about a couple of hours'" (374 U.S. at 461), respondent traveled to Thailand for three months. Nor was respondent's trip "casual"; unlike Fleuti, respondent obtained a passport before leaving the United States. Finally, unlike Fleuti, respondent's actions were not "wholly innocent" (374 U.S. at 462), because she knowingly misrepresented her status in order to secure reentry into this country.

The court of appeals nonetheless concluded that these factors are merely "evidentiary" and could be disregarded because respondent's husband remained in this country and "she intended, at all times, to return to the United States" (Pet. App. 7a; footnote omitted). An in-

tent to return to the United States, however, is of little, if any, relevance in determining whether an absence has meaningfully interrupted either the continuity of a deportable alien's physical presence in the United States for purposes of Section 244(a)(1) or a lawful alien's permanent residence under Section 101(a)(13). Under the latter statute, after all, the question is whether the resident alien's *departure* was "not intended," not whether the alien's *return* was "not intended." Because, as we show below, Congress meant the "continuous physical presence" requirement to be strictly construed, there is no reason to believe that an "intent to return" is of any greater significance under the suspension of deportation statute than it is under the "entry" statute construed in *Fleuti*.

3. Comparison of the facts of this case with the decisions of other courts of appeals that have applied the *Fleuti* standards in the suspension of deportation context compels the conclusion that respondent's trip was meaningfully interruptive and that she failed to satisfy the "continuous physical presence" requirement. In *Heitland* v. *INS*, *supra*, for example, the Second Circuit relied on both *Fleuti* and *Wadman* in concluding that the aliens' six-week trip abroad was meaningfully interruptive of their "continuous physical presence" in this country. The court cited several relevant factors that militated strongly against a finding that the aliens' presence was continuous. First, unlike Fleuti and Wadman, "who were at all times lawful permanent resident aliens prior to their departure, the Heitlands, once they remained beyond the six-month period for which they were originally admitted to stay in the United States, were at all times present in this country in violation of its laws." 551 F.2d at 502. Because the Heitlands had "no right at all to reside in this country at the time of their departure for their native land," their situation was markedly different from that of Fleuti and Wad-

man, "who had the right to reside in the United States, [and] would not have been subject to deportation if they had simply remained within this country's borders." *Ibid.* Second, the court noted that before embarking on their trip the Heitlands had to obtain passports and visas, thus evidencing "the deliberateness with which [the trip] was undertaken." *Ibid.* Finally, the court pointed out that "in using implicitly deceptive methods to secure re-entry in the United States, the Heitlands were engaged in a course of conduct directly contrary to a 'policy reflected in our immigration laws.'" *Id.* at 503, quoting *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462.

The circumstances of this case are remarkably similar to those in *Heitland*. Here, respondent, who traveled abroad for three months, was illegally in the United States when she departed, and, accordingly, she had no reasonable basis to expect the government to permit her to remain in this country or to readmit her upon her return. Respondent obtained a passport prior to her departure, an event that should have caused her "to consider more fully the implications involved in [her] leaving the country." *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462. Finally, as both the immigration judge (Pet. App. 28a) and the Board of Immigration Appeals (*id.* at 17a-18a) found, respondent knowingly misrepresented her status in order to secure reentry into the United States. Hence, the Second Circuit's statement in *Heitland* is equally applicable to respondent (551 F.2d at 503-504):

> The implicitly fraudulent circumstances of [her] return, when considered with the admitted illegality of [her] presence in the United States before [her] departure and the substantial period of time for which [she] absented [herself], do not present a picture of the type of hardship or injustice which *Fleuti* or its progeny were intended to remedy.

> This was a substantial and deliberate interruption of an illegal presence in the United States, accomplished through consciously misleading conduct.

Similarly, in *McColvin* v. *INS*, 648 F.2d 935 (4th Cir. 1981), the alien was found deportable for staying in this country beyond the time authorized and was granted the privilege of voluntary departure. The day after he departed the United States, the alien reentered this country as a nonimmigrant visitor for business authorized to remain for a period not to exceed six months. In concluding that the alien's one-day absence was meaningfully interruptive, the court observed that "any roots that petitioner had established in the United States were put down with the knowledge that his stay in this country was temporary, and, therefore, any plans or expectations for the future that he might have developed could not have been legitimate ones." 648 F.2d at 939. In addition, the court noted that the alien left "with the knowledge that, if he did not depart voluntarily, he would be deported. If he left with the intention of returning, that intention was disingenuous." *Ibid.*

In contrast to McColvin, who was absent from this country for only one day, respondent remained outside the United States for three months. The court of appeals, however, relying on its earlier decision in *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979), held that the Board of Immigration Appeals applied an erroneous legal standard in concluding that respondent's absence was meaningfully interruptive. As we now show, the decision below is based on an overly generous construction of the suspension of deportation statute, improperly commingles the "extreme hardship" and "continuous physical presence" requirements of the statute, and will undermine enforcement of our immigration laws.

B. The Language, Structure And History Of The Immigration And Nationality Act Support A Narrow Construction Of The "Continuous Physical Presence" Requirement

In *Kamheangpatiyooth* v. *INS*, *supra*, the court of appeals assumed that Congress intended the "continuous physical presence" requirement of Section 244(a)(1) "to be generously construed." 597 F.2d at 1256.[8] That assumption, which also underlies the decision below, is contrary to the language, structure and history of the statute, all of which point in precisely the opposite direction.

1. In Section 244(a)(1) Congress provided that an alien applying for the extraordinary relief of suspension of deportation must have been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application * * *." 8 U.S.C. 1254(a)(1). The language of the statute, which includes modifiers such as "*physically* present" and "*continuous* period," reflects a congressional intent that the "continuous physical presence" requirement be read narrowly. On its face, the statute "contains no exception to the requirement of seven years of 'continuous physical presence' in the United States to be eligible for suspension of deportation." *McColvin* v. *INS*, *supra*, 648 F.2d at 937.

Moreover, in *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956), this Court rejected the suggestion that it should resolve all doubts in favor of the applicant in construing the suspension of deportation statute; instead, the Court stated, "we must adopt the plain meaning of a statute, however severe the consequences." More recently, in

[8] Indeed, at one point the court suggested (597 F.2d at 1260 n.7) that the "continuous physical presence" requirement of Section 244(a)(1) should be given "a more liberal reading" than the "entry" provision (8 U.S.C. 1101(a)(13)) considered in *Fleuti*.

INS v. *Wang*, 450 U.S. 139, 145 (1981), this Court observed that a narrow interpretation of the term "extreme hardship" in Section 244(a)(1) "is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy." It would be anomalous to conclude that Congress permitted one of the eligibility requirements for suspension of deportation ("extreme hardship") to be construed narrowly while at the same time requiring that another of the statutory requirements ("continuous physical presence") be given a generous construction.

2. Comparison of Section 244(a)(1) with other contemporaneously enacted provisions of the Immigration and Nationality Act reinforces the view that Congress intended the "continuous physical presence" requirement in Section 244(a)(1) to be construed strictly. Thus, former Section 301(b) of the Act, 8 U.S.C. 1401(b), provided that certain individuals shall lose their status as United States nationals and citizens unless they "come to the United States and [are] continuously physically present therein for a period of not less than two years" between 14 and 28 years of age. Section 301(b) further provided that "[i]n the administration of this subsection absence from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence." Under traditional principles of statutory construction, the deliberate omission of a similar provision in Section 244(a)(1) compels the conclusion that Congress meant the "continuous physical presence" requirement of that section to be given a narrow, if not a literal, interpretation. See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981).

Similarly, Section 316 of the Act, 8 U.S.C. 1427, which establishes a five year continuous "residence" requirement for admission to citizenship as well as a separate requirement of "physical presence" totalling at

least half of the period of residence, underscores the distinction in the Act between residence and physical presence. This distinction is critical in the context of Section 244(a)(1) because, as the legislative history (discussed below) demonstrates, Congress amended the suspension of deportation statute by replacing a seven year "continuous residence" requirement with the current "continuous physical presence" requirement. Under the present statutory scheme, therefore, "the mere maintenance of a domicile or place of general abode is not sufficient. The statute is explicit in commanding in each instance continuous physical presence in the United States * * *." 2C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 7.9d(2), at 7–145 (1979) (footnote omitted).

3. The court in *Kamheangpatiyooth* sought to justify its loose reading of the "continuous physical presence" requirement by reference to "the ameliorative aim of the § 244(a) suspension process" (597 F.2d at 1256 n.3) as purportedly reflected in the legislative history of the statute. The legislative history on which the court relied (*id.* at 1256 n.4), however, is inapposite because it predates the enactment of the "continuous physical presence" provision.

Prior to 1940, "the Attorney General had no discretion in ordering deportation, and an alien's sole remedy was to obtain a private bill from Congress." *INS* v. *Wang*, *supra*, 450 U.S. at 140 n.1. See *Foti* v. *INS*, 375 U.S. 217, 222 (1963). In the Alien Registration Act of 1940, ch. 439, Section 20, 54 Stat. 672, Congress authorized the Attorney General to suspend deportation of aliens of good moral character whose deportation "would result in serious economic detriment" to their citizen or lawful resident alien family members. In 1948, Congress amended the statute to make the suspension process available to aliens who "resided continuously in the United States for seven years or more"

and who could show good moral character for the preceding five years, regardless of family ties. Act of July 1, 1948, ch. 783, 62 Stat. 1206.[9]

While the above history tends to support the view expressed by the court of appeals in *Kamheangpatiyooth* that the suspension of deportation statute was enacted to serve a generally "remedial" purpose (597 F.2d at 1256), that history is of no help in construing the "continuous physical presence" provision of the statute, which was not enacted until 1952. The history of the 1952 Act reflects Congress' intention that the "continuous physical presence" requirement "be applied in a rigorous manner." *McColvin* v. *INS*, *supra*, 648 F.2d at 938.

In its studies of the Nation's immigration laws which led to the enactment of the 1952 Act, the Senate Committee on the Judiciary noted that INS field officers had "criticized the administrative interpretation of the 7-year residence provisions of the law. These provisions have been held applicable to an alien who has a total of 7 years' residence in the United States, although the alien has been out of the United States for as long as 2 years during the last 7 years." S. Rep. No. 1515, 81st

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[9] The Senate Report explained:

> It is the information of the committee that there are a number of worthy cases in which persons, deportable on technical grounds, have lived in the United States for many years, but have no close family ties so as to enable them to become eligible for discretionary relief on the basis of serious economic detriment to the citizen or legally resident alien, who is the spouse, parent, or minor child of such persons. The committee has already considered and recommended the enactment of private bills to adjust the immigration status of certain deportable aliens who are in this general category. It is only just that other persons in this category who have not been favored by the introduction of private bills should have their cases considered for relief.

S. Rep. No. 1204, 80th Cong., 2d Sess. 3 (1948).

Cong., 2d Sess. 602 (1950). Two years later, "in an attempt to discontinue lax practices and discourage abuses" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 31 (1952)), Congress amended the suspension of deportation statute to require seven years' continuous *physical presence* in the United States.[10]

In short, the 1952 amendments to the suspension of deportation statute manifested Congress' "design to restrict the opportunity for discretionary action * * *. The 1952 Act thus was a reversal of the previous trend for the allowance of a wide flexibility in order to alleviate hardship." 2 C. Gordon & H. Rosenfield, *supra*, § 7.9a, at 7-131 (footnote omitted). Accordingly, it is clear that Congress intended the "continuous physical presence" requirement to be strictly construed. The court of appeals' overly generous interpretation of the statute is directly contrary to this intent.

4. Respondent nevertheless argues (Br. in Opp. 4-5) that a liberal interpretation of the "continuous physical presence" requirement would not detract from the exceptional nature of the suspension of deportation remedy because the alien must still satisfy the "good moral character" and "extreme hardship" requirements of the statute. Of course, the same argument could be made, in turn, with respect to each of the other statutory requirements.[11] Respondent also contends that a gener-

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[10] The 1952 Act also required an alien to show "exceptional and extremely unusual hardship" in order to qualify for suspension of deportation. 8 U.S.C. (1952 ed.) 1254(a)(1). Although this provision was subsequently amended to require that the alien show that deportation would result in "extreme hardship" (Act of Oct. 24, 1962, Pub. L. No. 87-885, Section 4, 76 Stat. 1248), the "continuous physical presence" requirement remained unchanged.

[11] In fact, as we have noted above (see page 8, note 5), the erroneous approach of the court of appeals on the "continuous physical presence" issue is also reflected in its reversal of the

ous construction of the statute is appropriate because it will not require the granting of relief, which is within the Attorney General's discretion. But Congress explicitly provided that the Attorney General need not exercise his discretion, and indeed does not even have authority to grant suspension of deportation, unless the alien satisfies the statutory eligibility requirements. Unless Congress' dictates are to be ignored, the eligibility requirements must be given a more rigorous interpretation than that accorded by the court of appeals.

C. The "Hardship Test" Adopted By Court Of Appeals Renders The "Continuous Physical Presence" Requirement Meaningless

After stating that Section 244(a)(1) is to be "generously construed," the court in *Kamheangpatiyooth* purported to explain the "function" of the seven-year "continuous physical presence" requirement (597 F.2d at 1256; footnote omitted):

> It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh. Continuity in the prescribed period of physical presence was required because continuity is important to the legitimacy of the inference that extended presence is likely to make deportation harsh. Presence that is only intermittent suggests the alien has not become so attached to this country that the authorities should consider suspending normal operation of the immigration laws on his behalf.

The court's assertions concerning the congressional purpose for adopting the "continuous physical pres-

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determinations of the Board of Immigration Appeals on the "good moral character" and "extreme hardship" issues.

ence" requirement are wholly speculative and find no support in the language or history of the statute. See pages 20-25, *supra*. It is well established that Congress ordinarily expresses its purpose through the words used in the statute itself. See *American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 5; *Richards* v. *United States*, 369 U.S. 1, 9 (1962). Here, the statute speaks in terms of "continuous physical presence," not "non-intermittent presence." Moreover, the harshness of deportation is addressed in the separate "extreme hardship" requirement of the statute.

Nevertheless, based on its speculative view of the congressional purpose, the court in *Kamheangpatiyooth* held (597 F.2d at 1257) that

> [a]n absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

The court of appeals in this case relied heavily on this test in ruling that the BIA applied an erroneous standard when it concluded that respondent's trip abroad was meaningfully interruptive of her "continuous physical presence." Thus, even though respondent may have increased the risk of deportation as a result of her three-month absence and her false representations to secure reentry, the court below held that an absence cannot be considered meaningfully interruptive unless *both* factors—an increase in the risk of deportation *and* a reduction in the severity of hardship—are present (Pet. App. 8a). Indeed, the court of appeals suggested that an alien's absence would not necessarily be deemed meaningfully interruptive even if both factors are satisfied (*ibid.*).

The court of appeals' "hardship test" for determining whether an alien's absence is meaningfully interruptive is really no test at all. Under the court of appeals' approach, it is difficult, if not impossible, to conceive of a class of cases in which deportable aliens who have been in the United States for more than seven years would be able to satisfy the "extreme hardship" requirement but not the "continuous physical presence" requirement. To take one example, an alien who purchases a residence or obtains a job during a trip outside the United States might be said, under the court of appeals' test, to have meaningfully interrupted the continuity of his physical presence here, because his activities while outside the United States may have lessened the severity of his deportation. But such an alien is exceedingly unlikely to apply for Section 244(a)(1) relief upon his return to the United States, and if he did, suspension relief would be denied because the alien would also be unable to show that his deportation would result in "extreme hardship." Thus, the court's "hardship test" collapses the "continuous physical presence" requirement into the "extreme hardship" requirement and reads the former out of the Act.[12]

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[12] The decision below does not represent an isolated instance in which the Ninth Circuit has effectively disregarded the "continuous physical presence" requirement. See *Chan* v. *INS*, 610 F.2d 651 (1979), opinion withdrawn and petition for rehearing dismissed for mootness, 649 F.2d 753 (1980) (neither three-month trip to Hong Kong nor two-month trip to Austria were meaningfully interruptive); *de Gallardo* v. *INS*, 624 F.2d 85 (1980) (three and one-half month pleasure trip did not interrupt period of continuous presence); *Sida* v. *INS*, 665 F.2d 851 (1981) (month-long visit to Thailand to get married did not interrupt continuity of physical presence); *Hafeez* v. *INS*, No. 81-7453 (9th Cir. Dec. 1, 1982) (dictum; court noted that while alien traveled to Pakistan for four months to visit his family and made no living arrangements in the United States prior to his trip, record did not show that alien did anything while abroad to

Nothing in the language or history of Section 244(a)(1) suggests that Congress intended the determination of whether an alien has met the "continuous physical presence" requirement to turn on whether the alien's absence has reduced the severity of the hardships associated with deportation. As we have noted previously, Congress in Section 244(a)(1) already has provided for consideration of "extreme hardship" as a separate element in determining an alien's eligibility for suspension of deportation. It simply makes no sense to construe the "continuous physical presence" requirement as also requiring an assessment of hardship.

Moreover, the court of appeals' imposition of a "hardship" analysis in deciding the "continuous physical presence" issue is inconsistent with *INS* v. *Wang*, *supra*, where this Court held that the courts may not encroach upon the authority of the Attorney General and his delegates to construe the "extreme hardship" language "narrowly should they deem it wise to do so." 450 U.S. at 145. Here, instead of encroaching directly on this authority, the court below has required the Attorney General and his delegates to weigh the relative severity of the hardships of deportation as a principal factor in considering "continuous physical presence," a totally separate statutory prerequisite for suspension of deportation. By stressing the importance of hardship as a factor, the court has "made it much easier for an alien seeking suspension relief to prove the continuous physical presence element of his prima facie case." Comment, *Suspension of Deportation: A Revitalized Relief for the Alien*, 18 San Diego L. Rev. 65, 82 (1980). Congress clearly did not intend this result, which allows further wholesale invasions of our Nation's immigration laws.

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diminish the hardship of deportation and thus BIA erred in finding that alien did not satisfy "continuous physical presence" requirement).

D. The Court Of Appeals' Application Of The "Innocent, Casual And Brief" Test Established In *Rosenberg* v. *Fleuti* Will Undermine Enforcement Of The Nation's Immigration Laws

Because the courts since *Wadman* have treated the terms "continuous" in Section 244(a)(1) and "not intended" in Section 101(a)(13) of the Act as analytically analogous, the implications of the decision below extend beyond the suspension of deportation context. If a departure is not meaningfully interruptive of an alien's "continuous physical presence" within the meaning of Section 244(a)(1), then presumably it also would not be meaningfully interruptive for purposes of invoking the "entry" doctrine codified in Section 101(a)(13) with respect to lawful permanent resident aliens.

In its decision in *Fleuti*, this Court did not attempt to establish a rigid definition of what constitutes a "meaningfully interruptive" departure. Instead, the Court listed several factors that it deemed relevant in making that determination in any given case, including the length of the trip, whether travel documents were procured prior to departure and whether the purpose of the trip was to accomplish an object contrary to our immigration laws. 374 U.S. at 462. At the same time, the Court recognized that additional factors might be considered by the courts in future cases. Consistent with this Court's approach in *Fleuti*, we do not believe that a bright line may readily be drawn between departures that are meaningfully interruptive and those that are not. In our view, the precise contours of the *Fleuti* doctrine remain to be fleshed out in individual cases. Our argument here, however, is that the court of appeals erred in ignoring the very factors cited in *Fleuti* as relevant to a proper resolution of the question, and in focusing instead on a factor—hardship—addressed elsewhere in the statute. Hence, wherever the line between meaningful and nonmeaningful departures

may be, it is not where the court below drew it. The court of appeals lost sight of the fact that the *Fleuti* test was meant to protect aliens from the "unsuspected risks and unintended consequences of * * * wholly innocent action." *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462.

Thus, despite the fact that, under the standards enunciated in *Fleuti*, respondent's absence was neither innocent, casual nor brief (see pages 16-19, *supra*), the court of appeals held that these factors "are 'only evidentiary' as to whether an absence breaks the continuity of seven years presence" (Pet. App. 6a). According to the court below, the proper approach is to view the circumstances "in their totality" in light of the underlying statutory purpose (*ibid.*).[13] Applying this approach in *Kamheangpatiyooth*, the court of appeals observed that "[a]n absence of six or even 16 months does not interrupt the requisite continuity of physical presence as a matter of law." 597 F.2d at 1258.[14] In addition, the

[13] As noted above (see pages 25-26, *supra*), the court's perception of the underlying statutory purpose is wholly speculative and without support in the statutory language or history.

[14] In support of this observation, the court in *Kamheangpatiyooth* pointed out that Congress replaced the continuity of residence requirement in the predecessor to Section 244(a)(1) with the current "continuous physical presence" requirement in response to complaints by INS field officers that the residence provision had been construed to permit an alien who had been out of the United States for as long as two years during the preceding seven years to apply for suspension of deportation. 597 F.2d at 1258 n.6. According to the court, "[t]his suggests that two-year absences might bar relief, if indeed it would be consistent with Congress's overall purposes to read any specific period, standing alone, as conclusively barring relief." *Ibid.* This reasoning is fallacious. It is absurd to conclude that, because Congress was motivated to enact the "continuous physical presence" requirement by reported instances of extreme abuses arising under the prior statute, the requirement was meant to

court in *Kamheangpatiyooth* stated that in some circumstances, the fact that an alien has obtained travel documents prior to departure "may confirm the essential continuity of his presence in this country and the lack of any reasonable basis for anticipating that the planned absence might imperil his status." *Id.* at 1259. In sum, according to the court of appeals, the *Fleuti* factors may be disregarded whenever the reviewing court concludes, on the basis of whatever circumstances—such as "hardship"—it cares to invoke, that the alien has satisfied the underlying "purpose" of the statute.

Under the approach adopted by the court of appeals in this case and in *Kamheangpatiyooth*, therefore, it would be virtually impossible to conclude in any given case that an alien has made a meaningful departure. As a result of this approach, few if any lawful permanent resident aliens who leave the United States would be excludable at the border pursuant to 8 U.S.C. 1225 and 1226, because they may not be regarded as making an "entry" on their return. See *Landon* v. *Plasencia*, No. 81-129 (Nov. 15, 1982), slip op. 9. In addition, under the court of appeals' approach, the INS would be hampered in its ability to deport aliens whose deportability is dependent on an event occurring within a particular peri-

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apply *only* to equally extreme situations. Such a conclusion essentially ignores the terms "continuous" and "physical" in the statute and transforms the seven-year "continuous physical presence" requirement into a seven-year "presence" requirement. Furthermore, as noted above (see pages 23-24, *supra*), we believe that the legislative history supports a narrow construction of the "continuous physical presence" requirement. Thus, we emphatically disagree with the court of appeals' observation in *Kamheangpatiyooth* that "[i]f Congress intended an outer limit on the length of noninterruptive absence, the circumstances leading to the 1952 amendment to the Act indicate that limit was not near the 30-day range." 597 F.2d at 1258 n.6.

od of time following an "entry." See 8 U.S.C. 1251(a)(3), (4), (8), (13), (15).

As the Fourth Circuit pointed out in *McColvin* v. *INS*, *supra*, 648 F.2d at 938, "[t]he criteria laid down in *Kamheangpatiyooth* clearly gave rise to a broader interpretation of 'continuous' than the *Fleuti* Court gave to 'intended.'" This result is ironic because the statute at issue in *Fleuti* was designed "to ameliorate the severe effects of the strict 'entry' doctrine" (374 U.S. at 462) with respect to lawful permanent resident aliens, whereas the "continuous physical presence" requirement in Section 244(a)(1) was meant "to discontinue lax practices and discourage abuses" (H.R. Rep. No. 1365, *supra*, at 31) with respect to deportable aliens. In this case, the court of appeals nevertheless concluded that deportable aliens who have illegally overstayed their visas and have used deceptive means to gain reentry following a substantial absence will be eligible for the "exceptional * * * remedy" (*INS* v. *Wang*, *supra*, 450 U.S. at 145) of suspension of deportation.

The fundamental problem with the court of appeals' approach is that, having started from the erroneous premise that the statute is to be "generously construed," the court has expanded its interpretation of the "continuous physical presence" requirement in successive cases until the actual language of the statute has become largely irrelevant to the result reached in any given case. One need not subscribe to the view that the "continuous physical presence" language of Section 244(a)(1) was meant to be interpreted literally in order to conclude that the court of appeals has simply gone too far in holding that an alien such as respondent, who left the United States for *three months* and misrepresented her status in order to return to this country, has met the "continuous physical presence" requirement of the statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1983